
IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No.

WILLIAM JAMES RUMMEL,

Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SCOTT J. ATLAS
VINSON & ELKINS

2100 First City National
Bank Building
Houston, Texas 77002

Counsel for Petitioner

Of Counsel

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

March 10, 1979

INDEX

	<u>Page</u>
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
1. The Decision Below Directly Conflicts with the Decision of Another Court of Appeals in Applying Eighth Amendment Disproportionality Analysis to a Habitual Offender Statute Mandating a Life Sentence for Commission of Three Relatively Trivial, Nonviolent Property Offenses	4
2. The Decision Below Applies Incorrectly the Relevant Test Prescribed by Applicable Decisions of this Court for Evaluating Whether a Particular Sentence is Unconstitutionally Disproportionate	5
3. The Eighth Amendment Issue Raised in this Case is One of First Impression that Requires Clarification by this Court Because of Confusion in the Lower Federal and State Courts Concerning the Appropriate Standards by Which to Evaluate Whether a Lengthy Sentence is Unconstitutionally Disproportionate	16
Conclusion	19

Citations

Cases

	Page
<i>Badders v. United States</i> , 240 U.S. 391 (1916)	6
<i>Bordenkircher v. Hayes</i> , 434 U.S. 357 (1978)	6, 11
<i>Carmona v. Ward</i> , 576 F.2d 405 (2d Cir. 1978), <i>cert. denied</i> , 47 U.S.L.W. 3460 (U.S. Jan. 9, 1979) (No. 78-5531)	6, 8, 17, 18
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	6, 7, 14, 16
<i>Downey v. Perini</i> , 518 F.2d 1288 (6th Cir.), <i>vacated and</i> <i>remanded on other grounds</i> , 423 U.S. 993 (1975)	5
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972)	6, 13, 14
<i>Glasscock v. State</i> , 570 S.W.2d 354 (Tex. Crim. App. 1978), <i>petition for cert. filed</i> , 47 U.S.L.W. 3485 (U.S. Nov. 29, 1978) (No. 78-861)	17
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	6, 16
<i>Green v. Commonwealth</i> , 556 S.W.2d 684 (Ky. 1977)	18
<i>Hart v. Coiner</i> , 483 F.2d 136 (4th Cir. 1973), <i>cert. denied as</i> <i>untimely filed</i> , 415 U.S. 938 (1974)	4-5, 11, 12, 13, 14
<i>Hutto v. Finney</i> , 98 S. Ct. 2565 (1978)	6
<i>Imprisoned Citizens Union v. Shapp</i> , 451 F. Supp. 893 (E.D. Pa. 1978)	16
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977)	6
<i>In re Lynch</i> , 503 P.2d 921 (Cal. 1973)	18
<i>Jones v. Cunningham</i> , 371 U.S. 236 (1963)	8
<i>McMahan v. State</i> , 382 N.E.2d 154 (Ind. 1978)	17
<i>O'Donnell v. State</i> , 326 So. 2d 4 (Fla. 1974)	18
<i>People v. Lorentzen</i> , 194 N.W.2d 827 (Mich. 1972)	18
<i>Pickard v. State</i> , 585 P.2d 1342 (Nev. 1978)	18
<i>Rummel v. Estelle</i> , 568, F.2d 1193 (5th Cir. 1978), <i>rehearing</i> <i>en banc granted</i> April 21, 1978	2-3, 4, 11, 13, 18
<i>Rummel v. Estelle</i> , 587 F.2d 651 (5th Cir. 1978) (en banc) <i>passim</i>	
<i>Smith v. United States</i> , 273 F.2d 462 (10th Cir. 1959)	18
<i>State v. Guerrero</i> , No. 78-CR-538 (Bexar County, Texas Dist. Ct., entered Nov. 1, 1978)	17
<i>State v. Lee</i> , 558 P.2d 236 (1977)	12
<i>State v. Mitchell</i> , 563 S.W.2d 18 (Mo. 1978) (en banc)	18
<i>State v. Myers</i> , 570 P.2d 1252 (Ariz. 1977) (en banc), <i>cert.</i> <i>denied</i> , 435 U.S. 928 (1978)	18
<i>United States v. Washington</i> , 578 F.2d 256 (10th Cir. 1978)	18
<i>Weems v. United States</i> , 217 U.S. 349 (1910)	5, 6, 7, 13

Statutes

	Page
28 U.S.C. § 1254	2
Tex. Laws 1856, Paschal, <i>Digest of Texas Laws</i> , art. 2464 (1866)	12
Texas Penal Code art. 63 (1925)	2, 3, 4, 10
Texas Penal Code Ann., Savings Provision § 6 (1974)	13
Texas Penal Code Ann. § 12.21 (1974)	13
Texas Penal Code Ann. § 12.42 (1974)	2
Texas Penal Code Ann. § 12.43 (1974)	13
Texas Penal Code Ann. § 19.03 (1974)	13
Texas Penal Code Ann. § 31.02 (1974)	13
Texas Penal Code Ann. § 31.03 (1974)	10, 13
Texas Revised Civil Statutes Ann. art. 60711-2 (1977)	10

Other Authorities

Katkin, <i>Habitual Offender Laws: A Reconsideration</i> , 21 Buffalo L. Rev. 99 (1971)	7, 11
Packer, <i>Making the Punishment Fit the Crime</i> , 77 Harv. L. Rev. 1071 (1964)	11
Radin, <i>The Jurisprudence of Death: Envolving Standards for</i> <i>the Cruel and Unusual Punishment Clause</i> , 126 U. Penn. L. Rev. 989 (1978)	6
Tappan, Book Review, 65 Harv. L. Rev. 1092 (1952)	13
Timasheff, <i>The Treatment of Persistent Offenders Outside of</i> <i>the United States</i> , in 40 J. Crim. L. & Criminology 455 (1940)	13
Weschler, <i>Sentencing Innovations in Sentencing Institute:</i> <i>Violence Today - A Judicial Concern</i> , 46 F.R.D. 497 (1968)	11
Wheeler, <i>Toward a Theory of Limited Punishment: An</i> <i>Examination of the Eighth Amendment</i> , 24 Stan. L. Rev. 838 (1972)	10
Wheeler, <i>Toward a Theory of Limited Punishment II: The</i> <i>Eighth Amendment After Furman v. Georgia</i> , 25 Stan. L. Rev. 62 (1972)	14
Comment, <i>The Eighth Amendment, Beccaria, and the En-</i> <i>lightenment: An Historical Justification for the Weems v.</i> <i>United States Excessive Punishment Doctrine</i> , 24 Buffalo L. Rev. 783 (1975)	7

	<u>Page</u>
Note, <i>The Cruel and Unusual Punishment Clause and the Substantive Criminal Law</i> , 79 Harv. L. Rev. 635 (1966) ..	7
Comment, <i>Texas Sentencing Practices: A Statistical Study</i> , 45 Texas L. Rev. 471 (1967)	10
Brief for Petitioner, <i>Coker v. Georgia</i> , 433 U.S. 584 (1976) ..	7
Second Supplemental Appendix of Petitioner-Appellant, <i>Rummel v. Estelle</i> , 587 F.2d 651 (5th Cir. 1978) (en banc)	11
Third Supplemental Brief of Petitioner-Appellant, <i>Rummel v. Estelle</i> , 587 F.2d 651 (5th Cir. 1978) (en banc)	15
Fourth Supplemental Brief of Petitioner-Appellant, <i>Rummel v. Estelle</i> , 587 F.2d 651 (5th Cir. 1978) (en banc)	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No.

WILLIAM JAMES RUMMEL,

Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner William James Rummel respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit en banc entered on December 20, 1978, in *Rummel v. Estelle*.

OPINIONS BELOW

The clerk's letter concerning entry of judgment of the court of appeals, dated December 20, 1978, is reproduced in a separately bound Appendix at Appendix A. (2a). The en banc opinion of the court of appeals, dated December 20, 1978, is reported at 587 F.2d 651 and is reproduced at Appendix A. (3a). The order denying the petition for rehearing, dated March 9, 1979, is reproduced at Appendix A. (1a). The panel opinion of the court of appeals,

dated March 6, 1978, is reported at 568 F.2d 1193 and is reproduced at Appendix A. (24a).

JURISDICTION

The judgment of the en banc Court of Appeals for the Fifth Circuit was entered on December 20, 1978, and the petition for rehearing was denied by that court on March 9, 1979. This petition for a writ of certiorari is being filed within 90 days of both dates. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the mandatory life sentence imposed on William James Rummel under the Texas habitual offender statute for theft by false pretext of \$120.75, with prior convictions for presenting a credit card with intent to defraud of property worth approximately \$80.00 and passing a forged \$28.36 check, constitutes cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions involved — the Eighth Amendment to the United States Constitution, article 63 of the Texas Penal Code of 1925, and its successor statute, article 12.42(d) of the Texas Penal Code of 1974 — are set out in Appendix B. (56a).

STATEMENT OF THE CASE

As stated in the Fifth Circuit panel opinion and quoted by the en banc opinion, the relevant facts are as follows:

In January 1973 a Texas grand jury indicted Rummel for the felony offense of obtaining \$120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: presenting a credit card with the intent to defraud of

approximately \$80 [in 1964] and [passing] a forged instrument with a face value of \$28.36 [in 1969]. [A] jury found him guilty as charged [of the false pretenses offense]. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925). [T]he Texas Court of Criminal Appeals affirmed his conviction. . . . Rummel applied for postconviction relief and raised in the Texas courts the [issue presented here and an ineffective counsel claim], but his application was denied without a hearing. Then Rummel sought habeas corpus relief [on the same grounds] in the federal district court, which also denied his petition without a hearing.

Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978) (panel opinion), *quoted in Rummel v. Estelle*, 587 F.2d 651, 653 (5th Cir. 1978) (en banc). On March 6, 1978, by a 2-1 vote, a Fifth Circuit panel reversed the district court decision and held that article 63's automatic life sentence was cruel and unusual as applied to the offenses for which the sentence had been assessed. 568 F.2d at 1193.

By an 8-6 vote, the Fifth Circuit sitting en banc vacated the panel opinion, affirmed the district court's denial of the petition on the Eighth Amendment issue, and remanded the case to the panel for reconsideration of the Sixth Amendment issue. The en banc court held, in short, that while a severe sentence imposed for a minor offense could be cruel and unusual solely because of its length, 587 F.2d at 655, Rummel's automatic life sentence does not violate the Eighth Amendment because Rummel failed to prove that the legislative scheme has no rational basis and is totally and utterly rejected in modern thought, *id.* at 661-62. The en banc court relied on the following grounds: (1) Texas' good time credit system gives Rummel an opportunity to become eligible for parole in twelve years if he behaves

while in prison, *id.* at 657-59; (2) the nature of the three underlying offenses triggering the mandatory application of article 63 is irrelevant because the statutory purpose is to punish a three-time felony offender irrespective of the nature of the underlying offenses, *id.* at 659; (3) Rummel might have received a comparable sentence in several other jurisdictions, *id.* at 659-60; (4) Rummel's sentence cannot appropriately be compared to the penalty for any single offense in Texas, *id.* at 660; and (5) the test of "whether significantly less severe punishment could achieve the purposes for which the challenged punishment is inflicted," *id.* at 660-61 (quoting the panel opinion, 568 F.2d at 1198), has no role in Eighth Amendment analysis.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS IN APPLYING EIGHTH AMENDMENT DISPROPORTIONALITY ANALYSIS TO A HABITUAL OFFENDER STATUTE MANDATING A LIFE SENTENCE FOR COMMISSION OF THREE RELATIVELY TRIVIAL, NON-VIOLENT PROPERTY OFFENSES.

In *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied as untimely filed*, 415 U.S. 938 (1974), the Fourth Circuit held that a life sentence mandated by a West Virginia recidivist statute (identical in all material respects to the Texas law) was cruel and unusual based on length alone because it was grossly disproportionate to the underlying offenses. The state court had enhanced Hart's punishment for committing perjury at his son's murder trial to life imprisonment on the basis of a 1955 conviction for interstate transportation of forged checks totaling \$140.00 and a 1949 conviction for writing a \$50.00 check on insufficient funds. In determining that the statutory punishment violated the Eighth Amendment as applied to Hart, the

Fourth Circuit considered cumulatively (1) the nature and gravity of the offenses, (2) whether a much less severe penalty could accomplish equally as well the legislative purpose behind the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment prescribed for other offenses in the same jurisdiction.

Hart and *Rummel* cannot be reconciled because, unlike the *Rummel* court: the *Hart* court (1) relied heavily on this Court's decision in *Weems v. United States*, 217 U.S. 349 (1910); (2) held that in considering the nature of the underlying offenses and in comparing them to the penalties for other offenses in the same jurisdiction, not only the number of offenses but also their gravity must be considered; (3) did not consider parole eligibility as a factor mitigating the harshness of a life sentence; (4) used a "much less drastic means" test based on the statutory purpose as one factor in the disproportionality inquiry;¹ and (5) did not require the prisoner to prove that the punishment assessed was totally irrational.

2. THE DECISION BELOW APPLIES INCORRECTLY THE RELEVANT TEST PRESCRIBED BY APPLICABLE DECISIONS OF THIS COURT FOR EVALUATING WHETHER A PARTICULAR SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE.

The principle that an excessively long prison sentence for trivial offenses can violate the Eighth Amendment has

¹ Cf. *Downey v. Perini*, 518 F.2d 1288, 1291-92 (6th Cir.), *vacated and remanded on other grounds*, 423 U.S. 993 (1975) (declaring excessive a 30-60 year sentence imposed on a first drug offender for sale of a small amount of marijuana, in part because the legislative purposes of the statute could be achieved by a much less severe penalty).

long been recognized by this Court, first in *Weems*² and repeatedly since.³

As pointed out recently by Justices Marshall and Powell in *Carmona v. Ward*, 47 U.S.L.W. 3460, 3461 (U.S. Jan 9, 1979) (No. 78-5531) (dissenting from denial of certiorari) (mandatory life sentence for possession of small amount of cocaine) (emphasis added):

² Although *Weems* was based in part on the inherent cruelty of the punishment, it also rested on the separate grounds that the Eighth Amendment prohibits excessive punishment as well and that the length of punishment must be proportioned to the offense. See *Weems*, 217 U.S. at 367-68, 371-73, 377; accord, *Carmona v. Ward*, 47 U.S.L.W. 3460, 3461 (U.S. Jan. 8, 1979) (No. 78-553) (Marshall & Powell, JJ., dissenting from denial of certiorari); *Hutto v. Finney*, 98 S. Ct. 2565, 2671 (1978); *Furman v. Georgia*, 408 U.S. 238, 325 (1972) (Marshall, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976), quoted approvingly in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (White, Stewart, Blackmun & Stevens, JJ., plurality opinion). See also *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (Powell, Burger, Stewart, Blackmun & Rehnquist, JJ.).

The en banc opinion refuses to recognize *Weems* as good law because of a subsequent decision in *Badders v. United States*, 240 U.S. 391 (1916), which the opinion characterizes as "summarily dismiss[ing] a proportionality attack on a five-year sentence." 587 F.2d at 655 n.7. But a five-year sentence hardly compares to a life sentence. Moreover, *Badders*, which does not mention *Weems*, is not even a disproportionality case: the convicted defendant's only Eighth Amendment objection challenged the mail fraud statute's making the deposit of each letter a separate offense. See 240 U.S. at 393.

³ *Gregg*, 428 U.S. at 173 (Stewart, Powell & Stevens, JJ., plurality opinion), quoted approvingly in *Ingraham*, 430 U.S. at 691 n.9 (White, Brennan, Marshall & Stevens, JJ., dissenting); *Furman*, 408 U.S. at 272 n.14 (Brennan, J., concurring); *id.* at 457 (Powell, Burger, Blackmun & Rehnquist, JJ., dissenting); see cases cited in note 2 *supra*; compare Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. Penn. L. Rev. 989, 1052-53 (1978) (discussing *Coker*). See also *Bordenkircher v. Hayes*, 434 U.S. 357, 370-71 (1978) (dissenting opinion), in which Justice Powell by negative implication suggests that a prosecutor can abuse even the broad discretion he is given in deciding whether certain offenses justify an indictment under a habitual offender statute.

Most recently, in *Coker* . . . , the Court refined the test for assessing Eighth Amendment challenges, concluding that

"a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592.

In holding the Georgia death penalty for rape invalid on the latter ground, the Court followed the approach of *Weems*, focusing on [(1)] *the character of the crime*, [(2)] *the punishment for the same offense in other jurisdictions*, and [(3)] *the penalty for similar crimes in the same jurisdiction*.

The en banc opinion, while conceding the validity in theory of both the excessiveness principle and the *Coker* test, see 587 F.2d at 655, emasculates the principal by applying the test improperly in practice.

A. Nature of the Penalty

In comparing the seriousness of the offenses with the harshness of the penalty, the en banc opinion discounts the length of Rummel's sentence by the probability of parole based on Texas' liberal system of awarding good time

Both federal and state courts have generally interpreted *Weems* as establishing the rule that excessive sentence length alone may render a punishment unconstitutionally cruel. Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buffalo L. Rev. 99, 117 & cases cited at n.82 (1971); Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783, 831-35 (1975) (discussing cases); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 640 (1966); Brief for Petitioner at 34 n.30, *Coker v. Georgia*, 433 U.S. 584 (1977).

credits, *id.* at 657-59, and considers *only* the constitutionality of an undefined, possibly lesser sentence, while ultimately conceding that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the majority's assertion [that Rummel's sentence is grossly disproportionate to Rummel's offenses] is probably accurate," *id.* at 659. Thus, if the en banc court had viewed Rummel's sentence as the term he actually received, it probably would have decided the case differently.

Accumulation of good time credit is useless to someone given a life sentence, as pointed out numerous times by the dissent, *see, e.g., id.* at 666, except with respect to determining when one first becomes eligible for parole consideration.⁴ Further, as a quote in the en banc opinion points out, "Texas . . . gives the longest sentences and is the most reluctant [State in the country] to grant parole." *Id.* at 658. Moreover, parole is a matter of executive grace not protected by due process. *Accord, id.* at 666-71; *see Carmona*, 47 U.S.L.W. at 3461. And the Parole Board's decision will depend largely on Rummel's behavior in prison, not the offenses for which he was sentenced. *Rummel*, 587 F.2d at 668-69. The en banc opinion treats a trusty's eligibility for parole after serving twelve years not only as a *guarantee* of parole but also as a guarantee of *complete freedom*, *id.* at 658, 660; *cf. id.* at 659 n.19, which it is not.⁵

⁴ Thus, the majority's example, 587 F.2d at 660, of two states — one that gives a fixed ten-year sentence and one that assesses a thirty-year sentence with good time credit that makes actual time served only ten years — breaks down when applied to a prisoner given a life sentence, since no amount of good time credit discharges completely a life sentence.

⁵ *See id.* at 666, 669, 670 (dissenting opinion); *cf. Jones v. Cunningham*, 371 U.S. 236, 241-43 (1963) (holding that a state prisoner placed on parole is "in custody" within the meaning of the habeas corpus statute because of "significant restraints" on a parolee's

Moreover, if a life sentence without possibility of parole for three petty, nonviolent offenses would probably be unconstitutional, as the majority apparently concedes, then surely the added "crime" of a "bad attitude" in prison, virtually guaranteeing rejection of a prisoner's parole application and assuring him of lifetime imprisonment, should not make the sentence any less constitutionally infirm. *Cf. id.* at 668-69. After all, no one would argue that a "bad attitude" makes more acceptable an otherwise unconstitutionally cruel method of torture or death, even if a "good attitude" carried with it the possibility of a reprieve.

B. Character of the Crime

Although the en banc opinion concedes that proportionality analysis requires consideration of the nature of the offense, it then refuses to consider the nature of the underlying offenses for which the habitual statute mandated Rummel's life sentence on the grounds that (1) the sentence was imposed for the commission of *any* three separate and distinct felonies, irrespective of the nature of those felonies, and (2) because Rummel has demonstrated that he cannot conform to society's rules, Texas has justifiably branded him a habitual criminal and accordingly

liberty). The en banc opinion attempts to demonstrate that the mandatory maximum ten-year sentence that Georgia courts must assess a habitual offender whose last offense is theft is "approximately the same" as Rummel's life sentence because Rummel *might* be paroled in twelve years *if* (and only if) (1) he remains a trusty during that period and (2) the Parole Board chooses to grant parole. *Id.* at 660. But Georgia assesses a mandatory maximum of ten years for theft only on someone convicted four times and only if the fourth offense was committed after the third conviction, so that Rummel could not be sentenced under that provision of Georgia law. Further, even if he is eventually paroled, Rummel's lifetime of restrictions can hardly be dismissed as insignificant when compared to the *unconditional* release after ten years that a Georgia convict would receive for the same crimes.

imprisoned him for life, subject only to the Parole Board's exercise of its virtually unfettered discretion to parole him if he behaves. *Id.* at 659. But the issue is *not* whether Texas can classify Rummel a habitual offender or enhance his punishment, which Rummel concedes, but whether Texas can enhance the punishment by so much for so little.⁶ By refusing to consider the nature of the underlying offenses, the majority opinion converts Rummel's as-applied challenge into a *per se* challenge, treats a life sentence for petty offenses identically to the manner in which it would treat a life sentence for three heinous, violent crimes, and in effect precludes any as-applied challenge to the habitual statute, regardless of the triviality of the offenses, so long as those offenses are punishable as criminal. Under the majority decision as written, if the State can punish a

⁶ The majority opinion challenges Rummel's assertion that his offenses are more trivial than most others and asks "by what authority does Rummel denigrate [sic] the interest society has in punishing his crimes?" *Id.* at 662 n.29. But Rummel does *not* challenge the State's right to punish him; he questions *only* its right to include his petty crimes in the category of offenses for which a life sentence automatically applies. Moreover, it would be difficult to find three felonies any less serious than Rummel's. Compare Tex. Penal Code § 31.03(d) (4)(A) (1974) (making pig theft a felony, regardless of value); Tex. Rev. Civ. Stat. Ann. art. 60711-2 (1977) (making felonies the second and subsequent convictions for driving while intoxicated). To characterize crimes involving potential violence as significantly more serious than non-violent property offenses can be justified on the ground that, almost without exception, crimes involving great danger to the physical well-being of others carry the severest sentences. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 862 & n.7 (1972); see, e.g., Comment, *Texas Sentencing Practices: A Statistical Study*, 45 Tex. L. Rev. 471, 482-83, 491-93 (1967) (statistically demonstrating such a relationship between convictions for violent crimes and assessed term of incarceration in Texas, except for a wide disparity between the expected sentence (approximately ten years) upon conviction for a third nonviolent property felony if sentenced under article 63 and the life sentence mandated by that statute).

trivial traffic offense as a crime, then it can punish the third commission of such an offense with a life sentence.

As the panel opinion points out, 568 F.2d at 1198, none of these offenses, singly or in sum, justify a severe penalty. None involved violence, the threat of violence, danger to person or property, skill in crime, use of sophisticated implements of crime, possession of lethal weapons, or other indicia of potential harm to the social order.⁷

C. Punishment for Same Offense in Other Jurisdictions⁸

Rummel could not receive a mandatory life sentence for his three offenses in any other state, save possibly

⁷ Commentators uniformly condemn the imposition of a life sentence for comparatively petty offenders, even incorrigible ones, as offensive to universal standards of decency. See e.g., Katkin, *Habitual Offender Laws: A Reconsideration*, 21 Buffalo L. Rev. 99, 120 (1971); Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071 (1964). Theft in particular is usually rated one of the least serious crimes because it is not an offense that "threatens the underpinnings of the social order." Wechsler, *Sentencing Innovations in Sentencing Institute: Violence Today — A Judicial Concern*, 46 F.R.D. 497, 524-25 (1968). See also *Bordenkircher*, 434 U.S. at 371 (Powell, J., dissenting) (commenting on limited adverse societal implications of \$88.00 check forgery); *Hart*, 483 F.2d at 141 (such harsh treatment of petty offenders is both illogical and impractical).

⁸ Rummel filed in the en banc court a Second Supplemental Appendix containing the following charts:

(1) Table 1, which lists for each state and territory (and under federal law) in reverse chronological order the maximum punishment prescribed by each habitual offender statute in effect during the last 200 years;

(2) Tables 2-4, which categorize, total, and list — by length and type of punishment and number and type of triggering offenses — the federal, state, and territorial jurisdictions with habitual offender statutes at each five-year interval since 1900;

(3) Table 5, which lists every state that has ever enacted a recidivist statute mandating a life sentence, gives the years during which each statute applied, and describes each statute and its successor;

one.⁹ Moreover, Texas, which has punished third-felony offenders with a mandatory life sentence for 123 years, see *Tex. Laws 1856, Paschal, Digest of Texas Laws*, art. 2464 (1866), has ignored a clear, 50-year trend in recidivist statutes away from mandatory life sentences for repeaters committing any felonies¹⁰ toward lighter and discretionary

(4) Table 6, which divides into the same categories employed in Tables 2-4 all habitual offender legislation currently in effect; and

(5) Table 7, which lists every reported habitual offender case in the Texas Court of Criminal Appeals since 1965, grouping first all cases involving prisoners with convictions for three or more violent crimes, in descending order according to degree of potential violence.

Table 7 was updated in Rummel's Fourth Supplemental Brief at 10-11 n.9.

Subsequent references in this Petition to the laws of other states are based on these tables and can be verified there.

⁹ In that one state, Washington, which has a similar statute, the state supreme court has indicated that it probably would not permit application of the statute in a case like Rummel's. See *State v. Lee*, 558 P.2d 236, 240 n.4 (1977). *Hart* limited to violent crimes West Virginia's law requiring a life sentence after any three felony convictions. Every other state habitual offender statute requires commission of more offenses or at least one violent crime, imposes a sentence substantially less than life, or grants discretion to the sentencing authority.

The en banc opinion's suggestion that (1) six states might sentence Rummel automatically to a life term and (2) judges and juries in eleven states might have discretion to give him a life sentence, 587 F.2d at 659-60, is inaccurate for the following reasons: (1) it incorrectly equates discretionary and mandatory sentences, (2) it considers an alleged fourth felony conviction that does not appear in the record and is irrelevant in any event since it was not one of the offenses named in Rummel's indictment, and (3) it misconstrues eight state statutes that could not apply to Rummel, because of either the nature of his offenses, when they occurred, or both.

¹⁰ Seventeen other states have "experimented" with mandatory life sentences for any felonies, apparently concluded that such a harsh penalty is either ineffective, counterproductive, or inhumane, and revised their laws by either (1) making the sentence discretionary [9 states], (2) limiting the statute's application to violent felonies [1 State], (3) both (1) and (2) [3 States], (4) reducing the mandatory sentence to a term less than life [2 States], (5) both (1) and (4) [1 State], or (6) repealing the statute entirely [1 State].

sentences and a violent-crime limitation. And it appears that no other western nation punishes recidivists as severely as Texas does.¹¹

D. Punishment for Other Offenses in Texas

Only capital murder is punishable by a mandatory life sentence (or death) in Texas. See *Tex. Penal Code Ann.* § 19.03 (1974). Every other felony, including many violent crimes, are punishable by sentences that are either much less than life imprisonment or discretionary. *Rummel*, 568 F.2d at 1199 & nn. 10-11. And since 1974, Rummel's last offense has carried a maximum sentence of only *one year*, even for a person with two prior felony convictions.¹²

¹¹ Compare Timasheff, *The Treatment of Persistent Offenders Outside of the United States*, in 40 J. Crim. L. & Criminology 455, *passim* (1940); Tappan, Book Review, 65 Harv. L. Rev. 1092, *passim* (1952).

¹² If Rummel's trial for theft by false pretext had ended after January 1, 1974, and Rummel had requested assessment of punishment under the new Penal Code, see *Tex. Penal Code Ann.*, Savings Provision § 6(c) (1974), his offense would have been only a misdemeanor, *id.* § 31.03(b)(1), (d)(3) (raising from \$50.00 to \$200.00 the minimum amount necessary to constitute a felony); see *id.* § 31.02 ("theft" as defined in section 31.03 includes the offense previously called "theft by false pretext"), carrying a maximum punishment of only one year in prison and a \$2,000.00 fine, *id.* § 12.21(2). Even under the new Penal Code's habitual misdemeanor statute, *id.* § 12.43(a), which applies to anyone on trial for a Class A misdemeanor who has a prior felony conviction, Rummel's prison term could not exceed one year.

This reduced sentence highlights both the relatively trivial nature of the offenses, compare *Hart*, 483 F.2d at 138 n.1, and the public's increasingly more sophisticated enlightenment concerning incarceration and treatment of habitual offenders, see *Weems*, 217 U.S. at 378 (the cruel and unusual punishment clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice") (quoted in *Furman*, 408 U.S. at 242 (Douglas, J., concurring)).

The en banc opinion rejects Rummel's comparison of the punishment for various single offenses in Texas with the life sentence he received for three petty offenses on the ground that the sentence resulted from Rummel's status as a habitual criminal, not from the commission of any one offense. 587 F.2d at 660. But Rummel's status is based in part on the nature of each offense (*i.e.*, all must be felonies), and surely no one would dispute that Rummel's repetitive but petty, cheating conduct causes less societal harm than the commission of one rape, kidnapping, or murder.

E. Imposition of Severe Punishment Without Furthering Any Legitimate Penal Purpose

After rejecting Rummel's claim that his life sentence is grossly disproportionate to his crimes, the en banc opinion refuses to consider the statutory purposes of the Texas recidivist law, *id.* at 661,¹³ even though *Coker* makes clear that a punishment may be excessive if it fails to serve any legitimate penal goal, 433 U.S. at 592; *see id.* n. 4 (the converse applies).¹⁴

Every conceivable legislative purpose behind the life sentence as applied to Rummel — isolation, deterrence, rehabilitation, and retribution — is undermined by the statute or could be served equally as well by a substantially

¹³ The en banc opinion rejects the "lack of necessity test" based on the fear that the State could never prove that a sentence of one length deters more effectively than a shorter sentence. 587 F.2d at 661 (quoting Wheeler, *Toward A Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 Stan. L. Rev. 62, 77-78 (1972)). But this criticism fails to recognize that the burden is on the petitioner to prove that the punishment imposed is excessive, not on the State to prove that it is not.

¹⁴ Compare *Furman*, 408 U.S. at 279 (Brennan, J., concurring) (pointing out that the standard as expressed in *Coker* incorporates the standard as expressed in *Hart*). *See also id.* at 300, 311, 331 (views of Justices Brennan, White, and Marshall, respectively, on the need for a "least drastic means" test).

shorter sentence for such petty offenses. First, studies consistently reveal that recidivist laws fail to isolate the true threat to the social order — the professional, dangerous criminal — who either (1) escapes detection or conviction and thus has no prior record upon which to base a habitual charge or (2) receives such a long sentence upon first or second conviction that the enhanced sentence for a third conviction is unnecessary. *See Third Supplemental Brief of Petitioner-Appellant at 25-26 nn.25-28, Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (citing numerous studies). By the time most petty thieves are imprisoned as habitual criminals, their propensity toward criminal activity has declined with age and maturity. *Id.* at 26 n.30. Moreover, life imprisonment *far* exceeds the sentence normally imposed on others with similar convictions but not charged as habituals. *Id.* at 27 n.31; *cf. id.* n.32; note 6 *supra*.

Second, a habitual law that punishes murderers and forgers alike does not deter crime, *see id.* at 27-28, and may even encourage a petty repeat offender to commit more serious crimes in order to avoid severe punishment for the minor offense, *id.* at 28. Third, experts and common sense repudiate the notion that the prospect of either permanent incarceration or long-term confinement followed by lifetime parole with no possibility of complete freedom serves a rehabilitative function, especially when it has twice failed. *See id.* at 29 & n.39. Fourth, retribution, even if a legitimate penal goal, cannot justify a penalty far exceeding the severity of the offenses for which it is assessed. Finally, studies reveal that judge, jury, and prosecution nullification combine to ensure that indiscriminately harsh habitual offender statutes advance no coherent policy. *See id.* at 30-34.

F. Rational Basis Test

The en banc opinion demands that a punishment, to be unconstitutionally disproportionate, can have "no rational

basis." 587 F.2d at 655-56, 661-62. This burden is an impossible one to discharge, since the opinion refuses to examine the nature of the underlying offenses, *see id.* at 659; and it is inappropriate for Eighth Amendment analysis, since even the most reprehensible torture has *some* rational basis as retribution or deterrent. Moreover, the "rational basis" standard has *no* support in this Court's Eighth Amendment decisions, which require *at most* that the courts give *deference* to the legislative judgment, *see, e.g., Gregg*, 428 U.S. at 175 (Stewart, Powell & Stevens, JJ., plurality opinion). The disproportionality test is separate from and independent of the rational basis test.¹⁵ And *Rummel* has satisfied even this burden. That the statute may be rational when applied to those committing at least one violent offense does not justify the law's application to *Rummel*.

3. THE EIGHTH AMENDMENT ISSUE RAISED IN THIS CASE IS ONE OF FIRST IMPRESSION THAT REQUIRES CLARIFICATION BY THIS COURT BECAUSE OF CONFUSION IN THE LOWER FEDERAL AND STATE COURTS CONCERNING THE APPROPRIATE STANDARDS BY WHICH TO EVALUATE WHETHER A LENGTHY SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE.

This court has not previously addressed the issue whether a lengthy sentence automatically imposed for

¹⁵ *See Coker*, 433 U.S. at 592-93 n.4 (White Stewart, Blackmun & Stevens, JJ., plurality opinion) (emphasis added):

Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may measurably serve the legitimate ends of punishment* and therefore it is not invalid for its failure to do so.

See also id. at 592; *Imprisoned Citizens Union v. Shapp*, 451 F. Supp. 893, 895 (E.D. Pa. 1978) (pointing out that a punishment violates the Eighth Amendment if it *either* (1) shocks the conscience, (2) is grossly excessive, or (3) is not rationally related to legitimate penological goals).

relatively trivial offenses can violate the Eighth amendment solely because of length. In *Carmona* this Court refused to review lengthy sentences given for drug offenses, an area in which legislatures have traditionally determined, either directly or by implication, that the offender is part of a system that spawns violent crime and threatens the social fabric. But this case involves no such legislative determination, as starkly illustrated by the disparity between the life sentence *Rummel* received in April 1973 and the present one-year maximum. *See* note 12 *supra* & accompanying text.

Although not occurring often enough in Texas to create the flood of litigation that the court below apparently fears, the imposition of a life sentence on a three-time petty offender has occurred, on the average, at least once every other year in Texas since 1965,¹⁶ at least one additional instance in Texas in the last few months,¹⁷ and at least once recently in Indiana,¹⁸ and possibly Tennessee.¹⁹

Moreover, each new lower federal and state court decision on this issue reflects confusion among those courts

¹⁶ Only 7 of the 363 habitual offenders (.0193) who have received a life sentence in reported cases in the Texas Court of Criminal Appeals since 1965 have committed three nonviolent, petty property crimes (*i.e.*, certain thefts, forgeries, embezzlements, shop-liftings, or some combination). This is no flood, just a trickle.

¹⁷ *See State v. Guerrero*, No. 78-CR-538 (Bexar County Dist. Ct. entered Nov. 1, 1978) (certified copies of (1) the indictment and jury verdict, reflecting a conviction for forging a \$22.50 check and prior convictions for forging a \$123.10 check and child desertion (second offense) and (2) the judgment, reflecting a life sentence, are included in Appendix C for the Court's convenience).

¹⁸ *McMahan v. State*, 382 N.E.2d 154 (Ind. 1978) (life sentence for three forgery convictions).

¹⁹ *Glasscock v. State*, 570 S.W.2d 354 (Tenn. Crim. App. 1978), *petition for cert. filed*, 47 U.S.L.W. 3485 (U.S. Nov. 29, 1978) (No. 78-861) (life sentence after conviction for grand larceny).

concerning the appropriate criteria by which to judge lengthy sentences for excessiveness, both in terms of the general excessiveness principle²⁰ and its application.²¹

²⁰ Compare, e.g., *In re Lynch*, 503 P.2d 921, 930 (Cal. 1973) (en banc) (citing cases in Kentucky, Oregon, Michigan, and Alaska, each employing a different formulation of the general principle); and cases cited in *Rummel*, 568 F.2d at 2044-45 n.6 (panel opinion), with *United States v. Washington*, 578 F.2d 256, 258 10th Cir. 1978) (a sentence within statutory limits cannot be challenged as cruel and unusual); *Smith v. United States*, 273 F.2d 462, 468 (10th Cir. 1959) (same); and *O'Donnell v. State*, 326 So. 2d 4, 5-6 (Fla. 1975) (same), and with *State v. Myers*, 570 P.2d 1252, 1264 (Ariz.) (en banc) (no discernible test); and *Green v. Commonwealth*, 556 S.W.2d 684, 687 (Ky. 1977) (same).

²¹ Compare, e.g., *Carmona*, 47 U.S.L.W. at 3461-62 & n.12 (discussing California and New York cases, which evaluated Eighth Amendment claims based on the maximum possible terms, irrespective of the possibility of parole); and *Pickard v. State*, 585 P.2d 1342, 1344 (Nev. 1978) (no consideration of possibility of parole), with *People v. Lorentzen*, 194 N.W.2d 827, 831, 834 (Mich. 1972) (test is the minimum possible punishment); and *State v. Mitchell*, 563 S.W. 2d 18, 27 (Mo. 1978) (en banc) (same).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Scott J. Atlas

SCOTT J. ATLAS

VINSON & ELKINS

2100 First City National
Bank Building
Houston, Texas 77002
(713) 651-2024

Counsel for Petitioner

Of Counsel

CHARLES ALAN WRIGHT

2500 Red River
Austin, Texas 78705

March 10, 1979